ERRATA

Nos. 691-693

Page 11.—Sixth line from bottom of page. The word "unexcelled" should read "unexplored."

Page 14.—In lines 12, 15 and 19 — The word "gold" should read "metal."

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SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1947

Nos. 691-693

CHICAGO MINES COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

THE LONDON EXTENSION MINING COMPANY,
as Transferee of CHICAGO MINES COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

THE LONDON EXTENSION MINING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF JOHN HAMM, AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In support of Petitioner's petition for Writ of Certiorari, John Hamm, an individual residing at Leadville, Colorado, as Amicus Curiae, respectfully submits the within Brief in support of Petition for Certiorari.

OPINION OF COURT BELOW

The opinion of the Circuit Court of Appeals, Tenth Circuit, dated November 6, 1947, is reported in 164 Fed. (2d) 785, Advance Sheets of February 9, 1948, and is found in the record commencing at page 61.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT OF UNITED STATES IS INVOKED

The grounds upon which jurisdiction of the Supreme Court is invoked are set forth in Petitioner's Brief, page 14.

STATEMENT OF CASE

A brief statement of the case is set forth in Petitioners' Brief, pages 14-16, and for brevity will not be repeated here.

John Hamm respectfully represents to the Court that he is now and has been for several years engaged in mining operations, principally as lessee of ore dumps and that he is directly concerned and affected by the decision of the Court below in this case and especially the decision as to No. 3508, wherein Chicago Mines Company is Petitioner.

SPECIFICATION OF ERRORS

Petitioner's specification of errors is set forth in Petitioners' Brief, page 16, and will not be repeated here. Discussion herein, however, will be confined to those of Petitioners' specifications which involve the failure of the court below to follow and apply this Court's decisions in *Herring v. Commissioner,* 292 U.S. 322, 55 S. Ct. 179, 79 L. Ed. 389; *Douglas v. Commissioner,* 322 U. S. 275, 64 S. Ct. 988, 88 L. Ed. 1271; and *Kirby Petroleum Company v. Commissioner,* 326 U. S. 599, 66 S. Ct. 409, 90 L. Ed. 343.

Rephrasing petitioner's specifications of errors, numbers 1 and 2, it is submitted that the United States Supreme Court of Appeals, Tenth Circuit, erred:

1. In denying to the owner and to the lessee deductions for depletion under Sec. 23 (m) and Sec. 114(b)(4)(A) and (B), upon the ground that income realized from dump ore as distinguished from newly mined ore is not income from a mine.

2. In failing to apply the principle that an owner and his lessee of a mining property have an economic interest therein and thus are entitled to a deduction for depletion under Sec. 23(m), computed as a percentage of income from the property under Sec. 114(b)(4)(A) and (B).

ARGUMENT

I.

Percentage depletion deductions apply to income from a mining property, irrespective of whether such income results from current, past, or anticipated future production of ores from the natural deposit.

The court below denied to the owner of the mineral property, and to the lessee of the owner, a deduction for percentage depletion calculated upon income derived from ores which had been produced in earlier years from the owner's mine and stored in a dump on the surface of the property. The lower court stated the issue to be whether a "dump" is a "mine" within the meaning of Sec. 23(m). It held that a "dump" was not a "mine" within that Section and therefore that income from the ore in the dump was not "income from the property", within the meaning of Sec. 114 (b)(4)(A) and (B), upon which percentage depletion is allowed. The court interpreted the words "in the case of mines", appearing in both Sec. 23(m) and 114(b)(4) as being limited to "an exacavation in the earth from which minerals are removed by digging or

other mining processes" . . . "the vein load or deposit of minerals"; and the court therefore held that "mining thus connotes the removal of minerals from a natural deposit and does not include the re-working of mineral dumps from the surface of the earth, artifically created and resulting from mining operations".

The lower court thus denied the percentage depletion deduction upon the conclusion that statutory depletion is allowable only in case ore is being produced from a natural deposit and that to constitute "income from the property" under Sec. 114 (b) (4), the income must be obtained from contemporaneous production of ore from the natural deposit.

The lower court's restrictive interpretation of these statutes is directly in conflict with this Court's decision in *Herring* v. *Commissioner* and *Douglas* v. *Commissioner*, supra.

In the *Herring* case, *supra*, the words "in the case of mines, oil and gas wells. . .", which now appear in Sec. 23(m) and 114(b)(4) were construed to embrace, as applied to an oil property, land upon which there was no oil well; and the words "income from the property" were construed to embrace a bonus for a mineral lease upon such land as being a payment in advance for oil which might, sometime in the future, be extracted from such land. A similar construction has been repeatedly afforded the word "mines" in these statutes and the propriety of allowing a depletion deduction, in the absence of contemporaneous production of ore from a natural deposit, was recognized and upheld by this Court in the *Douglas* case, *supra*.

The facts in the *Herring* case were these: The taxpayers owned a cattle ranch which they leased in 1926 for mining and operating for oil and gas. Upon execution of the lease in 1926, the taxpayers received $683,793.75 as bonus or advance royalty upon which they claimed a deduction for depletion. At that time there were no wells on the

leased lands and none within three and one-half miles from such lands; and it was not until four years later (1930) that any wells were drilled upon the leased land. In 1926 the taxpayers claimed a percentage depletion deduction upon such bonus, although there was no oil well in existence and no production from any oil well. The applicable revenue act was the Act of 1926, which in Section 214(a)(9) granted

> "in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion ***";

and which in Section 204(c)(2) provided for depletion on the percentage basis as follows:

> "In the case of oil and gas wells the allowance for depletion shall be 27½ percentum of the gross income from the property during the taxable year. ***"

(These provisions of the 1926 Act are identical to the material provisions of Sections I.R.C. 23(m) and 114(b), applicable to the cause at bar, except that the word "mines" is substituted for "oil and gas wells" and the rate is 15%.)

The Commissioner contended that the statutory language which granted a depletion deduction "in the case of . . . oil and gas wells" necessarily excluded a case where there was no well in existence and no production from any well. The Court held that the fact that no well was in existence did not preclude the claimed deduction; that a bonus or advance royalty is *income from the property* and as such is a proper basis upon which to compute a percentage deduction. The Court said:

> "A bonus is not proceeds from the sale of property, but payment in advance for oil and gas to be extracted, and is therefore taxable income. As such it is a part of the '*gross income from the*

property as the phrase is used in Section 204(c)(2) to designate the base for the application of the percentage deduction. From these premises the petitioners argue that the bonus received does not lose its character as income subject to depletion, merely because it happens that in the year of receipt there was no production of the depletable asset.

"The respondent replies that the allowance for depletion is a matter of grace, not of right, and that the act fails to grant any allowance on income such as that there involved. The argument is that in *both* the relevant sections of the act, the statute says 'in the case of *** oil and gas wells' and this expression necessarily excludes a case where no well exists. In support of this asserted statutory exclusion it is urged that a depletion allowance is essentially and exclusively reimbursement for wastage or exhaustion of assets, and Congress could not have meant to permit an allowance in any year in which there was no extraction of oil or gas, and no practical assurance of production in the future. We think these arguments cannot prevail to defeat the petitioner's right to the deduction." (Italics supplied.)

Following this quotation, the opinion sets out the Treasury's prior administrative views as to when and under what circumstances a percentage depletion deduction was allowable in regard to bonus payments and advance royalties, mentions the decisions of the Board of Tax Appeals, and then continues as follows:

"The situation presented by the administrative rulings is this: A bonus is not a receipt from a sale of a capital asset and may not be returned as such; it is income in the year received; if any depletion is to be allowed against the receipt, the allowance must be claimed for the year of re-

ceipt; it cannot be allowed in any later year; if the taxpayer computed depletion upon the basis of cost or March 1, 1913, value he may deduct depletion from a bonus payment, irrespective of the sinking of a well or the production of any oil or gas; if, however, he elects to avail himself of the alternative method of computing deduction at a per cent of gross income, *though the nature of the deduction is unchanged,* he may not have any unless there be production within the taxable year; if the production be but trifling he may take a full percentage deduction upon the entire bonus, however disproportionate the allowance to the actual extraction of oil during the year. To condition the allowance on actual production, however small, or the imminent probability of production, and to deal in refinements as to the degree of probability of future production is in many cases to deny any deduction where the taxpayer elects to compute it under section 204(c)(2) (flat percentage of gross income from the property) and to permit it where he elects to compute it under section 204(c) (on the basis of cost). *But the nature and the purpose of the allowance is the same in both cases, and we find neither statutory authority nor logical justification for withholding it in the one and granting it in the other; much less for making the decision turn upon the circumstance that no production is obtained within the year in which the bonus is paid.*" (Italics supplied.)

As the above quotation clearly states, this Court expressly refused to assign a restricted, technical definition to the words "in the case of * * * oil and gas wells." If the words "oil and gas wells" had been limited to mean a hole drilled into the ground, then as the Commissioner argued, the property was not one as to which the statute granted a depletion deduction. There was no "well" in

the *Herring case;* neither was there any production of oil or gas out of any well. Yet the Court there held:

First, that the owner-lessor of such property was entitled to a depletion deduction as being within the statutory language granting a depletion deduction "in the case of *** oil and gas wells"; and

Second, income received as a bonus for the execution of the oil and gas lease constituted "gross income from the property" within the statutory language prescribing the method of computing percentage depletion, although such income was not obtained through contemporaneous production from the natural deposit.

The rule of *Herring* has been applied in the same way and with the same force to metallic mineral properties — the right to a deduction for depletion "in the case of mines" is not dependent either upon the existence of a "mine" as technically defined to mean an "excavation in the earth" or a "vein lode or deposit of minerals" nor upon concurrent extraction and sale of minerals out of such a "mine" technically defined. This Court applied these principles to the words "in the case of mines" in *Douglas* v. *Commissioner, supra.* In that case the taxpayers were owners of a mine which they leased for a term of years to Republic Steel Company, the lessee undertaking to pay a royalty of 40c per ton for ore removed, and a minimum royalty of $20,000.00 per year for the first five years, and $60,000.00 per year thereafter. The lease was executed in 1929, remaining in effect until terminated in 1937, during all of which years the lessee paid the minimum royalty *but without producing any ore from the mine.* Each lessor took a proper depletion deduction in the respective years the royalties were received by them, 1926 to 1936, inclusive. Although the precise issue in the case was whether the amounts deducted for depletion in such years must be restored to income in 1937 when the lease terminated without any production thereunder, the Court reiterated the principle of the *Herring* case, *supra,* and

definitely held that the right to a depletion deduction is not dependent upon a *concurrent extraction* of minerals from a "mine." The Court said:

> "Deduction is allowed for the exhaustion of the property — the ore mass. Lynch v. Alworth-Stephens Co., 267 U. S. 364, 370. 45 S. Ct. 274, 275, 69 L. Ed. 660. *It may be in step with extraction, where extraction and sale synchronize with payments for the ore or the deduction may be allowed against advance payments of royalties or bonus. The theory of depletion is the same in both cases. In either situation, the depletion deduction is allowed in the ore extracted or expected to be extracted.* Regulations 45, Art. 23 (m) -2 and -10 (a) and (b). Thus the mine owner under Article 23 (m) -10 *is compensated for the use of his mineral reserves in the production of gross income.*" (Italics supplied.)

It is now, and has been since the decision in the *Herring* case, well settled that the owner of an economic interest in a mineral property is entitled to a deduction for depletion upon a bonus or advance royalty even though there is not on the property a "mine" or a "well" as technically defined, and even though there is no income produced by concurrent realization of the proceeds of oil extracted out of the ground or mineral extracted out of a vein lode or mineral deposit. Thus, it is well established that the words "in case of mines, oil and gas wells", as used in both Sections 23(m) and 114 (b) are not restricted to the technical definition of a mine or the technical definition of an oil and gas well as the Court below held. On the contrary, the cited cases clearly demonstrate that an unexcelled and undeveloped mineral property is within the meaning of the word "mines" as used in such sections, and that proceeds can be "income from the property" without being proceeds directly obtained from concurrent or simultaneous extraction of minerals out of the ground.

In the instant case the lower court held that the words "in the case of mines," appearing in Sections 23 (m) and 114(b), are limited to "the vein lode or deposit of minerals" and that "mining thus connotes the removal of minerals from a natural deposit." Such limited and strict interpretations of the words of the statute cannot be reconciled with the above-discussed decisions of this Court. There was no "mining" in *Douglas*; for eight years the taxpayers there received payments while the mine was idle and no ore whatsoever was removed. Yet such payments were held to be income from the property, properly subject to depletion allowance. There was no oil "well" in *Herring* and when the income was received it was not known whether there ever would be an oil "well." Yet the taxpayer was held entitled to a depletion deduction allowed "in the case of oil and gas wells" and the income was "income from the property." In the instant case the income under discussion came directly from ores out of a mine. But because the receipt of income was subsequent to the removal of the ores from the natural deposit, the depletion deduction was denied. This is in direct conflict with the decisions of this Court above discussed.

A bonus or advance royalty is held to be income from the property subject to percentage depletion upon the premise that it is income from possible future production which will deplete the minerals of the property; and the deduction is allowed, despite the fact that such subsequent production may, or may not, materialize. In the instant case, the income from minerals produced from the property was received after the production thereof, but the relationship of the income received to the actual production and physical depletion of the property is much more proximate and direct than in the case of an advance payment. Here the proceeds received are clearly payment for the recovery and sale of minerals earlier produced. As in the case of the advance payment, so it is with the subsequent payment — statutory depletion must be allowed at the time the income is received, else

it is denied entirely. It is immaterial, we submit, that ores produced from a mineral property were held for a time thereon in a dump with a result that income from the recovery of minerals from such ores was realized in a year subsequent to their severance from the natural deposit. Such income, when realized, is nonetheless income from the property subject to depletion within the principles of the *Herring* and *Douglas* cases, *supra*.

II.

Both the petitioners, one as owner and the other as lessee, owned an economic interest in the property and are therefore entitled to a depletion deduction upon the income therefrom, such deduction to be equitably apportioned between them.

No citation of authority is necessary for the proposition that The London Extension Mining Company, as an owner of the mining claims upon which was located the developed American Mine and upon which was located the dump ore in question, possessed the requisite ownership of an economic interest in a mineral property to entitle it to a deduction for depletion under Sec. 23(m).

Chicago Mines Company, as lessee of a part of that property from the owners, likewise possessed the requisite ownership of an economic interest therein. In *Palmer v. Bender*, 287 U. S. 551, 53 S. Ct. 225, 77 L. Ed. 489, this Court established the proposition that the right to a depletion allowance does not depend upon the retention of ownership or any other particular form of legal interest in the mineral content of the land. As to a lessor, the Court said "It is enough if by virtue of the leasing transaction he has retained a right to share in the oil produced. If so, he has an economic interest in the oil, in place, which is depleted by production. Thus we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the

minerals, in place, passed from the lessor upon the execution of the lease."

Thus this Court expressly pointed out that ownership of the mineral before removal from the ground is not a prerequisite of an economic interest; on the contrary, the test of an economic interest, as declared in *Palmer* v. *Bender, supra,* is whether the taxpayer has a right to share in the mineral produced. If so, he has an economic interest in the mineral, in place, which is depleted by production. Paraphrasing the words of the decision, it would be said that it is enough if the taxpayer has a right to share in the gold produced. If so, he has an economic interest in the property which is depleted by production. In the instant case, Chicago Mines Company, as a lessee, had a right to share in the gold recovered and produced from the ores obtained out of the mineral property. As such lessee, Chicago Mines Company owned an interest from which its only possibility of profit was dependent solely upon the extraction and sale of the gold from such ores. This Court's recent decision in *Kirby Petroleum Company* v. *Commissioner,* 326 U.S. 599, 66 S. Ct. 409, 90 L. Ed. 343, removes any question as to whether Chicago Mines Company had an economic interest in the mineral property sufficient to entitle it to the depletion deduction. In this case, it was held that a lessor of an oil property had retained an "economic interest" sufficient to support a depletion allowance, although that interest consisted solely of the retained right to share in the lessee-operator's net profits from production, operation and sale. The lessor in this case had retained no "title" or "ownership" of the mineral in the ground, no title or ownership in the mine as it was produced out of the ground, no right to share in the gross receipts upon the sale of the oil; yet, by owning the right to share in net operating income, such taxpayer was held to possess an economic interest entitling it to compute a percentage depletion deduction upon its share of such net profits. The opinion stated:

"Economic interest does not mean title to the oil, in place, but the possibility of profit from that economic interest, dependent solely upon the extraction and sale of the oil."

In the instant case, Chicago Mines does possess the requisite economic interest in the mineral property. Even if the dump ore does not in itself constitute a "mine" under Section 23 (m), which in view of *Herring* and *Douglas* it should, nonetheless the dump ore was still part of the "mine" and was part of the mining claims. Such ore had never been separated from the "mine" or mining claims in ownership. Chicago Mines as lessee of the deposit of ore from the mine located upon the claims was a lessee of a part of the mineral property and hence had the requisite economic interest. Furthermore, under the *Kirby* case, Chicago Mines clearly had such economic interest as is necessary to entitle it to a depletion deduction by virtue of the fact that its possibility of profit from its lease was "dependent solely upon the extraction and sale" of the gold and other mineral content of ores from the property. It is not necessary that Chicago mines have some form of legal ownership of the "mine" nor of the "mining claims"—under *Kirby,* Chicago Mines had an economic interest if it must get its profits from its lease solely from the extraction and sale of the mineral content of ores from the property.

The *Kirby* case further holds that the intent of Section 23(m) and 114(b) was to grant an entire depletion deduction amounting to a full 27½ per cent as to oil properties (15 per cent as to metal properties), and that in case of a division of the income from the property between lessor and lessee, the entire deduction of 15 per cent of the gross income from the property must be divided between the lessor and lessee. This is achieved by permitting and requiring the lessee to compute his deduction as 15 per cent upon the gross income from the property after subtraction of royalties paid to the lessor; and by permitting the lessor to compute his deduction as 15 per

cent upon the royalty received. Such method permits the full deduction of 15 per cent of the gross income from the property — no more and no less. But, if the allocated deduction is allowed to one but not the other, only part of the full 15 per cent of gross income from the property would be allowed and part would be denied. This Court held that the statute contemplates and requires that the entire 15 per cent shall be allowed. Thus, held the Court, where the lessee is entitled to compute his depletion upon gross income reduced by royalties paid to the lessor, the lessor must be allowed the deduction of 15 per cent of the royalties. Conversely, if the lessor is allowed the deduction of 15 per cent of the royalties, the lessee must be allowed the deduction of the balance, which is 15 per cent of gross income reduced by such royalties paid.

The result of this holding in the *Kirby* case and its application to the case at bar is as follows. If London Extension as lessor is entitled to an allowance for percentage depletion upon royalties from the ore dump proceeds, then Chicago Mines, as lessee, must be allowed the balance of the statutory deduction, which is 15% of gross income reduced by such royalties. The effect is to simplify the inquiry into "economic interest." If the *lessor* has the required economic interest and exploits it by leasing for royalty payments, and therefore is entitled to a percentage depletion deduction, then the balance of the statutory deduction must be allowed to the lessee. Chicago Mines, as lessee, does therefore have the required economic interest and is entitled to its share of the statutory deduction.

CONCLUSION

Congress allowed by Sec. 23(m) a deduction for depletion "in the case of mines" and by Sec. 114(B)(4) provided for a depletion deduction in the case of mines to be computed at the rate of 15% of the "income from the property." The deduction is not limited to income realized

from contemporaneous extraction of minerals out of a natural deposit, nor is the deduction confined to the operation of a "mine" as technically defined. On the contrary, the deduction is allowable if the income received it attributable to production of ores from the property, irrespective of whether the income therefrom is realized before or after the act of production. Ore produced and stored remains a part of the property. When such ore is converted into income, depletion of the property occurs; and that conversion produces "income from the property."

In the instant case, each of the petitioners, one as lessor, the other as lessee, had an economic interest in a mineral property and each received income from the extraction and sale of the mineral content from such property. Each should, therefore, under the previous decisions of this Court be entitled to the percentage depletion deduction in computing income subject to tax.

WHEREFORE, the undersigned attorneys for Amicus Curiae, ask that the decisions below be reviewed and reversed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

The statutory provisions involved are found in paragraph (m) of Sec. 23, and paragraph (b), sub-paragraphs (4) (A) and (B) of Sec. 114 of the Internal Revenue Code, Title 26 U.S.C.A. Sub-paragraph (4) (B) of paragraph (b) of Sec. 114 was added by Sec. 124 (c) of the Revenue Act of 1943, and is effective as though it were in the revenue laws applicable to all taxable years beginning after December 31, 1931.

Section 23, in force for the taxable periods here involved, insofar as pertinent, is as follows:

> Section 23. Deductions from Gross Income. In computing net income there shall be allowed as deductions: * * *
>
> "(m) Depletion. In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowances in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * * In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. * * *."

Section 114, in force for the taxable periods here involved, insofar as pertinent, is as follows:

> "Section 114. Basis for Depreciation and Depletion. (b) Basis for Depletion.—(4) Percentage Depletion for * * * Metal Mines * * *.
>
> "(A) In general. The allowance for depletion under Sec. 23 (m) shall be * * * in the case of metal mines, * * * 15 per centum * * of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or

royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property * * *."

Section 114 (b) (4) (B), as added by Section 124 (c) of the Revenue Act of 1943, effective as though it had been in the revenue laws applicable to all taxable years beginning after December 31, 1931, so far as pertinent, is as follows:

"(4) (B). Definition of Gross Income from property. As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining', as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The term 'ordinary treatment processes', as used herein, shall include the following: * * *; and (iv) in case of lead, zinc, copper, gold, silver or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity), flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 731 and 735."